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No. 503

IN THE

SUPREME COURT OF THE UNITED STATES

ARLAN'S DEPARTMENT STORE
OF LOUISVILLE, INC.
EVANS FURNITURE COMPANY . . Appellants

versus

COMMONWEALTH OF KENTUCKY . . Appellee

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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LAWYERS PRINTING CO. LOUISVILLE, KY.

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October Term 1962

No. 503

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC.
EVANS FURNITURE COMPANY — *Appellants*

v.

COMMONWEALTH OF KENTUCKY — *Appellee*

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The 1961 "Sunday Closing law" cases[1] decided by this Court are relied upon by appellees as authority for a summary dismissal of this case. In those cases this Court subjected the laws in question to a close and painstaking scrutiny in terms of their exact language, history and operative effect and considered related laws, pertinent judicial statements of purpose and

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1. *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101; *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617, 6 L. Ed. 2d 536, 81 S.Ct. 1122; *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 6 L.Ed. 2d 551, 81 S.Ct. 1135; *Braunfeld* v. *Brown*, 366 U.S. 599, 6 L.Ed. 2d 563, 81 S.Ct. 1144.

other evidence of legislative intent, and then, and only then, did this Court conclude that the laws were secular and not religious in purpose. Certainly these appellants and the people of Kentucky are entitled to nothing less.

This Court did not say by the 1961 cases that the question of separation of church and state is no longer important or that all Sunday legislation is henceforth valid. It was expressly stated in the opinions that they were not to be so construed.

If the Kentucky law is to be subjected to the same standards as were prescribed in the 1961 cases, then the question of its constitutionality can only be determined after the same exhaustive examination of its history and language as was made in the 1961 cases. Obviously, a cursory perusal can lead only to superficial conclusions. It is impossible to present all the data that must be considered in making a proper determination of the issue in preliminary motions and a jurisdictional statement and it is respectfully suggested that this Court cannot fairly dispose of the issue without the benefit of such matter.

Appellants note that appellee places much weight on the "long line of decisions" upholding this law upon

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McGowan v. Maryland, 366 U.S. at p. 453:

"We do not hold that Sunday legislation may not be a violation of the 'Establishment' clause if it can be demonstrated that its purpose evidenced either on the face of the legislation, in conjunction with its legislative history, or its operative effect—is to use the state's coercive power to aid religion."

Also see footnote 101 to Justice Frankfurter's concurring opinion, 366 U.S. at p. 512:

"This does not, of course, imply an opinion of the legitimacy of all the Sunday provisions of all the States."

secular grounds. It is submitted that appellee or this Court may also give weight to *Ray* v. *Catlett & Buck*, 51 Ky. 532, 12 B. Mon. 532, in which the Kentucky Court of Appeals considered the "Kentucky Sunday Closing Law" in substantially the same form as it is now, and in which the Kentucky Court of Appeals stated (51 Ky. at p. 534):

> "One object of the statute was to secure the observance of that decorum and quiet which in a Christian country, is due to the Christian Sabbath. . . ."

And at page 536 said further:

> "And we are satisfied that the particular clause now in question had no other object in view but that of enforcing decorum and quiet on a day regarded as holy by a large part of the community . . ."

In the cited opinion a secondary object of the law was mentioned as being to secure for laborers one day of rest in seven, but this does not alter the fact that this judicial statement of purpose by the Kentucky Court of Appeals places primary emphasis on "the observance of that decorum . . . due to the Christian Sabbath." The Kentucky statute is in substantially the identical form now as it was when the case of *Ray* v. *Catlett & Buck* was decided. The only significant change is the exceptions for amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations and opera.

These exceptions do not evidence a change in the stated objective of the law. Rather they represent a

change in the legislative mind as to acceptable conduct not inconsistent with the decorum due to the Christian Sabbath. While it is true that some of the Kentucky opinions cited by appellees set forth a secular basis for the law's legitimacy yet this cannot alter what was in the legislative mind when the law was enacted. Is the issue before this Court whether other grounds *can be found* to sustain the statute or is this Court concerned with the purpose and intent of the law? A careful reading of the Kentucky cases cited by appellees will clearly indicate that the case at bar represents the first case in Kentucky where the validity of the law on federal constitutional grounds was ever challenged. All pronouncements of constitutionality heretofore made have been dicta. It is of great interest that the Kentucky Court of Appeals should have read the 1961 cases and remained silent as to the purpose of the Kentucky law. The Court of Appeals did not even refer to any of the Kentucky cases cited by appellees.

Instead the Kentucky Court of Appeals disposed of the appellants' contention that the statute is religious in purpose by saying (*Com. v. Arlan's Dept. Store of Louisville, et al.*, Ky. 357 S.W. 2d 709, 710):

> "... the above listed cases [but] not the Court cases ... completely refute the contentions that our Kentucky Statute violates constitutional guarantees and prohibitions with respect to religion. ..."

Does not appellee engage in a tautology of the first order? Appellee tells this Court that it should reject appellants' contention that the law is religious

in purpose. Appellee reminds this Court of its consideration in the 1961 cases of judicial statements by state judges in sustaining the validity of the state statutes and then cites the case at bar where the Court of Appeals relied on this Court to refute appellants' contention. In other words, so the argument goes, the Supreme Court should hold that the Kentucky law is not religious in purpose because the Kentucky Court of Appeals held it wasn't and the Kentucky Court of Appeals held it wasn't because the Supreme Court said it wasn't.

Where in this verbal merry-go-round is "the close scrutiny demanded . . . . when First Amendment liberties are at issue."

Appellees wonder if the prohibition in the Kentucky law against work or labor for *amusement* as well as profit can be rationalized with the holdings of the 1961 cases wherein so much emphasis was placed on the tone of the day as being one of recreation and relaxation.[3] The ban is not only against commercial activity, it is against virtually all activity.

Are not the specific prohibitions against billiards, hunting, boxing and wrestling more consistent with the concept of Sabbath observance than with Sunday rest and recreation?[4]

Appellee states that the exceptions for Sabbatarians is merely an act of tolerance and this should not be

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3. *McGowan v. Maryland*, 366 U.S. at p. 448.
4. *McGowan v. Maryland*, 366 U.S. at p. 447.
Gallagher v. Crown Kosher Super Market, 366 U.S. at p. 622.
Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. at p. 595.

said to impart religious connotations to the statute. What need is there for religious tolerance in a statute the purpose of which is not to use the state's coercive power to aid religion? There is none. If the statute be secular in purpose and effect this Court has said there is no reason for anyone to be exempted from its operation because of his religion.[5] If the statute is not a Sabbath observance statute, why should the exemption apply only to those observing another day as the Sabbath? Uniformity of a general rest day for the community which in the 1961 cases was found to be a legitimate goal was not deemed necessary by the legislature of Kentucky. Otherwise there would be no exceptions for minority religions. There is, therefore, no reason for not exempting anyone who rests on a day other than Sunday unless the purpose of the statute is to insure Sabbath observance rather than one day of rest in seven. If the statute is religious in purpose and effect, then its tolerance however admirable does not save it from the proscription embodied in the constitution.

The Kentucky statute does not proclaim rest and relaxation for the community. Rather it proclaims that the Christian Sabbath shall be observed with decorum and respect by all except those who observe another Sabbath. If, by reason of this statute, secular benefits flow to the community, they are incidental to the legislative purpose. If merely from a finding that collateral secular benefits inure to the community

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5 *Braunfeld v. Brown*, 366 U.S. at p. 607.

a religious statute can be upheld, then the concept of separation of church and state has lost its meaning.

Appellee is silent with respect to the appellants' contention in their jurisdictional statement that regardless of whether the statute is religious or not, the exemption denies them equal protection of law by giving members of certain religious societies preferments denied to these appellants and to others who cannot or will not be members of any religious society. On what secular ground can this distinction be justified? On what rational ground can such discrimination be sustained?

Respectfully submitted.

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PROOF OF SERVICE

I, James E. Thornberry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on or before November 26, 1962, I served copies of the foregoing Appellants' Brief Opposing Appellees' Motion to Dismiss on the appellee herein by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record as follows: To John B. Breckinridge, Attorney General, State Capitol Building, Frankfort, Kentucky, and to Holland N. McTyeire, Assistant Attorney General, State Capitol Building, Frankfort, Kentucky. I further certify a copy hereof has been mailed to Charles E. Keller, 504 Marion E. Taylor Building, Louisville 2, Kentucky.

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